Filed 8/16/10 P. v. McPike CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **JENNIFER McPIKE,** **Defendant and Appellant.**	**A122030** **(San Mateo County Super. Ct. No. SC062239)**

Appellant Jennifer McPike appeals from a judgment placing her on felony probation after a jury convicted her of misdemeanor petty theft and a felony count of receiving stolen property. (Pen. Code, §§ 484, 496, subd. (a).)[1] We agree with her contention that both counts cannot stand because a defendant cannot be convicted of stealing and receiving the same property. We reject appellant's other claims of instructional error and ineffective assistance of counsel.

I. *FACTUAL AND PROCEDURAL HISTORY*

On the afternoon of August 20, 2006, Suzanne Sweeney and her husband drove from their rental house to their home in Woodside, which was being remodeled. They arrived at about 3:00 p.m. and stayed inside for about 45 minutes, after which they

[1] Further statutory references are to the Penal Code unless otherwise indicated.

returned to their car and discovered that mail addressed to neighboring houses had been scattered on the ground. After they delivered the mail to their neighbors, Sweeney noticed that her purse and cell phone were missing. The purse was worth about $1200. Sweeney and her husband returned quickly to their rental house, where she telephoned the sheriff to report the missing purse and cell phone and notified her credit card companies that cards inside the purse had been stolen.

On that same afternoon, appellant and her friend Jessica Quiroz Mason visited three stores in San Bruno and made various purchases using Sweeney's credit cards. Mason was driving her boyfriend's car. They first entered CompUSA, where Mason purchased a DVD player and a wireless keyboard using one of Sweeney's credit cards and signing the credit card receipt with Sweeney's name. According to the credit card receipt, the time of that purchase was 3:52 p.m. Appellant was standing a few feet away when Mason signed the receipt.

Appellant and Mason then went to a nearby Marshall's store, where they used two of Sweeney's credit cards to purchase various items in two separate transactions. The clerk recalled that each of them signed one of the two credit card receipts, although the signatures on both receipts were similar. Those transactions took place at about 4:14 p.m.

After leaving Marshall's, appellant and Mason went to the Sears Auto Center, where they spoke to a clerk about purchasing tires for a person who was not present. Appellant called someone on a cell phone to discuss the purchase and directed Mason to pay for the tires. Appellant and Mason then returned to the car and drove to the rear of the store to pick up the tires. One of the auto center technicians noticed them circling the parking lot in the car and saw appellant get out and pick up an object from the ground.

Meanwhile, Officer Johansen of the San Bruno Police Department arrived at Sears in response to a report that that someone had just made a purchase using one of Sweeney's credit cards. The clerk who had assisted appellant and Mason looked to the back of the parking lot and pointed out the car that Mason was driving. He later identified appellant and Mason as the women who had purchased the tires from him.

Officer Johansen detained appellant and Mason, who denied that they had been inside the store. He discovered Sweeney's purse on the back seat of the car with Sweeney's driver's license inside. A wallet belonging to Sweeney was discovered under the driver's seat and another wallet was found near a dumpster in the parking lot. Johansen searched appellant and discovered Sweeney's cell phone in her pants pocket; appellant claimed that she did not know who owned the phone. Keys, including one to Sweeney's car, were found on the passenger seat where appellant had been sitting. Billing records for Sweeney's cell phone later showed that it had been used to make a number of calls to numbers that Sweeney did not recognize between 2:59 p.m. and 4:20 p.m. on the day her purse was taken.

Appellant was charged by information with grand theft (§ 487), receiving stolen property (§ 496, subd. (a)), theft of an access card (§ 484e, subd. (d)), forgery (§ 470, subd. (a)) and three counts of second degree burglary (§§ 459, 460, subd. (b)). The case proceeded to trial, where both appellant and Mason testified. Mason had by that time pled guilty to the crimes with which appellant was charged.

According to Mason, she had taken Sweeney's purse after finding it at a bus stop in South San Francisco. Inside the purse were the credit cards. She picked up appellant in her boyfriend's car to go shopping, using the credit cards to pay for various items at CompUSA and Marshall's. She bought some things for appellant at Marshall's. She bought the tires for a third person that appellant knew with the understanding that appellant would pay her less than their face value. Mason did not believe appellant was guilty of any of the offenses.

Appellant testified that she had known Mason for about seven months and had asked her for a ride to Target to buy some diapers. They visited CompUSA and Marshall's, where Mason made various credit card purchases. Mason bought some sandals and shoes for appellant at Marshall's, with the understanding that appellant would repay her. They went to Sears to purchase a new tire for appellant's roommate. While in the store, appellant used a cell phone handed to her by Mason to call her roommate and get information about the type of tire she needed.

Appellant recalled that after Mason purchased the tires and they left the store to pick them up in the back, Mason threw a wallet out the window. Appellant got out to pick it up and Mason asked her to get rid of it. Appellant placed it on the ground. It was only then that appellant began to suspect the credit cards did not belong to Mason. She did not know about the purse on Mason's back seat and denied that Sweeney's cell phone was discovered in her own pants pocket. Appellant also denied knowing that Sweeney's keys were on the passenger seat.

The jury convicted appellant of receiving stolen property and misdemeanor petty theft as a lesser included offense of grand theft. It returned verdicts of not guilty on the forgery count and the two second degree burglary counts naming Marshall's and CompUSA as victims. The jury was unable to reach a verdict on the charges of theft of an access card and the remaining burglary count naming Sears as a victim. Appellant was placed on three years felony probation after the trial court declined to dismiss the receiving stolen property count as incompatible with the theft conviction.

II. *DISCUSSION*

A. *Dual Conviction of Petty Theft and Receiving Stolen Property*

Section 496, subdivision (a) describes several types of conduct constituting the offense known as receiving stolen property, "Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a state prison, or in a county jail for not more than one year." It is well-established that, subject to exceptions not relevant here, a defendant may not be convicted of stealing and receiving the same property. (*People v. Allen* (1999) 21 Cal.4th 846, 853 (*Allen*); *People v. Garza* (2005) 35 Cal.4th 866, 874-875 (*Garza*); *People v. Jamarillo* (1976) 16 Cal.3d 752, 757.)

Appellant argues that her felony conviction for receiving stolen property must be reversed because she was also convicted of stealing that same property. The People

respond that dual convictions are appropriate because the petty theft and receiving counts were based on different items of property. We agree with appellant that she cannot stand convicted of both counts.

Contrary to the district attorney's argument, the record establishes that appellant's convictions arose from the theft and receipt of same property. The evidence showed that Sweeney's cell phone, her purse and its contents were taken from her at the same time, and that all of these items were recovered in or near the car driven by Mason when appellant and Mason were stopped by Officer Johansen. The district attorney stated during closing argument that all of the charges against appellant were based on a theory that she had aided and abetted Mason, and the jury was instructed with CALCRIM Nos. 400 and 401 on aiding and abetting. No effort was made in the information, the instructions, or the district attorney's closing argument to differentiate the property underlying the theft and receiving counts.

The People note that the jury rejected the greater charge of grand theft, which requires the taking of property worth more than $400, and instead convicted appellant of petty theft, which is committed when the property taken is valued at $400 or less. (See §§ 487, subd. (a), 488.) They argue that because Sweeney testified without contradiction that her purse had a value of about $1200, the jury's rejection of grand theft showed that it had convicted appellant of stealing the cell phone that was discovered on her person, but not the purse itself. The People then posit that the conviction of receiving stolen property was based on appellant's concealment of other items of stolen property found in and near the car Mason was driving.

We are not persuaded by this interpretation of the verdict, which would have required jurors to conclude that appellant aided and abetted Mason in the theft of the cell phone but not the theft of the purse that was taken at the very same time. Even if the conviction for petty rather than grand theft amounted to a determination that the only property underlying that count was the cell phone discovered on appellant's person, the People do not satisfactorily explain why we should assume the conviction for receiving stolen property was based solely on other items of stolen property. It seems just as likely

the jury found appellant guilty of receiving the stolen cell phone that the People claim was the basis for the theft count. Judgment should not have been imposed on both counts. Consistent with our Supreme Court's recent decision in *People v. Ceja* (2010) 49 Cal.4th 1, we will affirm the conviction for petty theft and reverse the conviction for receiving stolen property. (See also *People v. Recio* (2007) 156 Cal.App.4th 719, 723; *People v. Love* (2008) 166 Cal.App.4th 1292, 1300; *People v. Stewart* (1986) 185 Cal.App.3d 197, 209, overruled on other grounds in *Allen*, *supra*, 21 Cal.4th at p. 866.)[2]

B. *Omission of Unanimity Instruction*

Appellant argues that the court should have instructed the jury that it could only convict her of receiving stolen property if it agreed which items of property she actually possessed. (See CALCRIM No. 3500.) Because we have reversed her conviction for receiving stolen property on other grounds, it is unnecessary to consider this claim. Appellant does not contend that a unanimity instruction was required with respect to the theft count, nor could she reasonably do so when the undisputed evidence showed that the purse, cell phone and wallets were taken from Sweeney's car at the same time. (See *People v. Brown* (1996) 42 Cal.App.4th 1493, 1499-1500 [unanimity instruction not required when no possibility jurors would disagree on act committed].)

C. *Instruction on Circumstantial Evidence*

The trial court instructed the jury with CALCRIM No. 223, which defines direct and circumstantial evidence, and with CALCRIM No. 225, regarding the evaluation of circumstantial evidence of intent or mental state. Appellant contends the court also should have given CALCRIM No. 224, concerning the evaluation of circumstantial evidence on all issues, not merely those relating to intent or mental state. Because we have reversed appellant's conviction for receiving stolen property on other grounds, we

---

[2] In our original opinion filed February 26, 2010, we concluded that the proper remedy was to reverse the petty theft count (the lesser of the two crimes) and allow the receiving stolen property count to stand. (See *People v. McPike* (Feb. 26, 2010, A122030).) The Supreme Court granted appellant's petition for review on June 23, 2010, and transferred the matter to us with directions to vacate the decision and reconsider the case in light of *Ceja*. (*People v. McPike*, S181481.)

consider whether CALCRIM No. 224 should have been given with respect to the theft count, and whether the omission was prejudicial.

CALCRIM Nos. 224 and 225 provide essentially the same information on how the jury should consider circumstantial evidence, but CALCRIM No. 224 is more inclusive.[3] (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1142 [discussing CALJIC Nos. 2.01 & 2.02].) CALCRIM No. 225 is to be used in place of CALCRIM No. 224 " 'when the defendant's specific intent or mental state is the only element of the offense that rests substantially or entirely on circumstantial evidence.' " (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1171-1172; Bench Notes to CALCRIM Nos. 224 & 225.)

---

[3] The version of CALCRIM No. 225 that was given in this case provided: "The People must prove not only that the defendant did the acts charged, but also that she acted with a particular intent and/or mental state. The instruction for each crime explains the intent and/or the mental state required. [¶] An intent and/or mental state may be proved by circumstantial evidence. Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. Also, before you may rely on circumstantial evidence to conclude that the defendant had the required intent and/or mental state, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required intent and/or mental state. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required intent and/or mental state and the other reasonable conclusion supports a finding that the defendant did not, you must conclude that the required intent or mental state was not proved by the circumstantial evidence. However, when considering circumstantial evidence you must accept only reasonable conclusions and reject any that are unreasonable."

CALCRIM No. 224 would have advised the jury, "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

In this case, evidence regarding appellant's identity as the person who stole Sweeney's purse and other property was largely circumstantial, based on her possession of the cell phone, her proximity to the purse, and her efforts to use stolen credit cards to make retail purchases. The circumstantial evidence relevant to the theft count was not limited to evidence of appellant's intent and mental state, and CALCRIM No. 224 should have been given. (See *People v. Rogers* (2006) 39 Cal.4th 826, 885 (*Rogers*) [failure to give CALJIC No. 2.01 in case where prosecution relied on circumstantial evidence to prove defendant's identity as the murderer].)

Reversal is required only if it is reasonably probable the jury would have rendered a more favorable verdict on the theft count had it been instructed with CALCRIM No. 224. (See *Rogers, supra*, 39 Cal.4th at p. 886; *People v. Burch* (2007) 148 Cal.App.4th 862, 872-873.) There was no prejudice in this case because the jury was substantially instructed on the relevant principles contained in CALCRIM No. 224. CALCRIM No. 225, though targeting circumstantial evidence offered to prove intent or mental state, also contained broader language relevant to identity and the elements of a charged offense: "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced the People have proved each fact essential to that conclusion beyond a reasonable doubt."

Moreover, CALCRIM No. 225 specifically advised the jury that circumstantial evidence could not be relied upon to conclude that appellant acted with the requisite criminal intent if it could be reasonably inferred from that evidence that criminal intent was lacking. In light of this instruction, the jury necessarily determined that appellant acted with the intent necessary for a theft conviction when it convicted her of that offense.

Appellant argues that by extending this principle *only* to intent, CALCRIM No. 225 erroneously suggested appellant could be convicted even if the jury believed it was reasonable to conclude that she had not been an accomplice in the theft itself. We are not persuaded. CALCRIM No. 223 advised the jury, "Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge,

including intent and mental state." Considering the instructions as a whole, it is not likely the jury applied a different rule to circumstantial evidence proving identity and to that proving intent.

D. *Modified Accomplice Instruction*

Appellant argues that the trial court erroneously gave an accomplice instruction regarding the consideration of Mason's testimony. She claims the instruction was prejudicial because the jurors might have believed they were required to view Mason's exculpatory testimony with caution. We disagree.

The instruction given was a version of CALCRIM No. 335, which provided in relevant part, "You may not convict the defendant . . . based on the testimony of the witness, Jessica Quiroz Mason, alone. You may use the testimony of Ms. Mason to convict the defendant only if [¶] 1. Ms. Mason's testimony is supported by other evidence that you believe; [¶] 2. That supporting evidence is independent of Ms. Mason's testimony; AND [¶] 3. That supporting evidence tends to connect the defendant to the commission of the crimes. [¶] Supporting evidence, however, may be slight. . . . . [¶] Any testimony of the witness, Jessica Quiroz Mason, that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that testimony the weight you think it deserves after examining it with care and caution and in light of all the other evidence."

CALCRIM No. 335 advised the jury that it should view incriminating testimony by Mason with caution, but it did not suggest similar treatment for exculpatory testimony. The California Supreme Court has approved language identical to that used in the instruction and we are bound by this authority. (*People v. Guiuan* (1998) 18 Cal.4th 558, 560-561, 569; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

E. *Ineffective Assistance of Counsel*

Appellant argues that her trial counsel should have objected to testimony given by Officer Johansen that when he interviewed the Sears Auto Center clerk who waited on appellant and Mason, the clerk said it appeared that appellant was "orchestrating the transaction." Appellant claims the clerk's statement to Johansen was inadmissible

hearsay offered to prove the truth of the matter asserted (that appellant was the person who controlled the transaction). (Evid. Code, § 1200.)

We agree the testimony about the clerk's statement was hearsay. We are not convinced by the People's response that it was admissible as a prior inconsistent statement under Evidence Code section 1235 or as past recollection recorded under Evidence Code section 1237. But the testimony was innocuous given that the clerk himself testified that he dealt primarily with appellant during the transaction and that Mason's involvement was limited to giving him the credit card for payment. Defense counsel may have made a tactical decision to forego an objection to the hearsay testimony because it was duplicative and would not affect the jury's view of the issues to which it pertained. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1185 [failure to object is generally tactical decision that will not be second-guessed on appeal].) Additionally, it is not reasonably probable appellant would have obtained a better result had an objection to the challenged testimony been lodged and sustained. (See *People v. Wader* (1993) 5 Cal.4th 610, 636 (*Wader*).)

Appellant also claims that defense counsel should have objected to the following testimony by Johansen describing the search of Mason's car: "Searching what I would call the rear most section of the vehicle, the hatchback [is] not necessarily a trunk, but that trunk space, located a plastic bag that contained some other identification, and credit card items belonging to another victim, whose name I don't recall without referring to my report." Appellant characterizes this testimony as an inadmissible "conclusory opinion" and suggests it was irrelevant and because it pertained to stolen property belonging to a different victim.

Johansen's testimony was not an impermissible lay opinion subject to exclusion under Evidence Code section 800—he was simply relating what occurred during his search of Mason's car. The substance of the testimony—that other stolen items were found in the car Mason was driving—was relevant to prove Mason's criminal intent under Evidence Code section 1101, subdivision (b), which was in turn relevant to the issue of appellant's guilt as Mason's aider and abettor. Given the relevancy of the

testimony, defense counsel cannot be faulted for failing to make a futile objection. (See *People v. Zavala* (2008) 168 Cal.App.4th 772, 780.)

In any event, it is not reasonably probable the jury would have reached a more favorable result if the testimony about the other victim's property had been excluded. (*Wader, supra*, 5 Cal.4th at p. 636.) That property was discovered in the back of Mason's boyfriend's car, in a location not readily accessible to a passenger such as appellant. Absent additional evidence showing that appellant was aware of those items or exercised some control over them, they were not particularly probative and it is unlikely they affected the jury's verdict.

III. *DISPOSITION*

The conviction for receiving stolen property under count 6 is reversed. The conviction for petty theft as a lesser included offense under count 1 is affirmed. The case is remanded for resentencing in light of this opinion.

NEEDHAM, J.

We concur.

JONES, P. J.

SIMONS, J.